THE PACIFIC BANK BHD.

v.

CHAN CHIN AUN & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-1370-90]
5 NOVEMBER 1992

PRACTICE AND PROCEDURE: Summary judgment against guarantor before SAR - Principal debtor given unconditional leave to defend - Whether guarantor entitled to same - Triable issues - Appeal against order of SAR.

The defendants were directors of Cherasview Development Sdn. Bhd. (CDSB) who executed a joint and several guarantee in their personal capacity in return for banking facilities granted by the plaintiff to CDSB.

In an earlier suit, CDSB successfully appealed against an order of the SAR granting leave to the plaintiff to enter judgment against CDSB on a summary application.

The defendants who were sued on their guarantee, submitted that their liability is co-extensive with that of CDSB and since CDSB had been given unconditional leave to defend, they should be given that some opportunity.

The plaintiff, on the other hand, contended that the appeal in the earlier action had been allowed not on the merits but only on the point of unexplained undue delay in making the application for summary judgment.

Held:

[1] CDSB has yet to be held liable to the plaintiff for the debt and summary judgment could not therefore be given against the defendants here as guarantors.

[2] The defendants have raised a number of triable issues including the variation of the facilities by the securing of the deposit of a title deed to land, the actual value of the shares deposited with the plaintiff and the lack of consideration for the guarantee.

[Defendants appeal allowed with costs.]

Cases referred to:

Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor. [1988] 1 CLJ 149 ***(refd)***

Perwira Habib Bank Malaysia Bhd. v. Syarikat Johor Tenggara Sdn. Bhd. & Ors. [1989] 2 MLJ 476 ***(refd)***

Government of Malaysia v. Gurcharan Singh & Ors. [1971] 1 MLJ 211 ***(refd)***

UMW (Sarawak) Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors. [1989] 3 MLJ 177 ***(refd)***

American Express Sdn. Bhd. v. Dato Wong Kee Tat & Ors. [1991] 1 MLJ 97 ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd. [1980] 1 MLJ 174 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 87

For the plaintiff - Nesarani; M/s. Nashir, Johal & Co.
For the defendant - Joseph Yeo; M/s. Philip Choong & Co.

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

By letter dated 4 December 1984, the plaintiff had offered Cherasview Development Sdn. Bhd. (hereinafter "CDSB") an overdraft facility of one million ringgit with interest at 2.75 per cent per annum above the base lending rate and a bank guarantee facility of two hundred and thirty million ringgit with interest at one per cent per annum on the principal sum subject to the lodgment of public shares acceptable to the plaintiff accompanied by the relevant transfer forms together with a signed memorandum of deposit registered in the name of the plaintiff's nominees, a joint and several guarantee of all the directors in their personal capacity for 1.23 million ringgit and a drawing margin of not more than sixty per cent of the market value of the shares. CDSB had executed the memorandum of deposit on 16 January 1981 and the defendants here had executed the guarantee on 21 January 1985.

By Kuala Lumpur High Court civil suit D1-23-825-87 (hereinafter "the earlier action") CDSB and the defendants here had been sued for RM412,741.66 on the overdraft facility and RM222,600 on the bank guarantee. Summary judgment was obtained on 7 November 1989 but prior to the hearing of the appeal against the decision of the learned Senior Assistant Registrar the plaintiff had on 9 July 1990 withdrawn the earlier action against the defendants here leaving only CDSB as the defendant in the earlier action.

In their affidavit opposing the plaintiff's application for summary judgment in the earlier action, CDSB had alleged undue delay on the part of the plaintiff as they had applied for summary judgment some twenty months after the filing of the statement of defence. The appeal against the learned Senior Assistant Registrar's decision was allowed on 25 February 1991.

The defendants here have relied on identical facts and issues raised by CDSB in the earlier action and it has been submitted that by virtue of s. 87 of the Contracts Act 1950, their liability is co extensive with that of CDSB and since CDSB had been given unconditional leave to defend in the earlier action, the defendants here should also be given that same opportunity.

The contention of the plaintiff is that the appeal by CDSB in the earlier action had been allowed not on the merits but only on the point of unexplained undue delay in making the application for summary judgment but to my mind, as it stands, CDSB has yet to be held liable to the plaintiff for the debt and summary judgment cannot therefore be given against the defendants here as guarantors. They are therefore also entitled to being given unconditional leave to defend. In any case, leaving the issue of estoppel aside, the defendants here have also raised a number of other triable issues including the variation of the facilities by the securing of the deposit of a title deed to land held under Grant No. 9267 Lot 41548 Mukim of Kuala Lumpur, the actual value of the shares deposited with the plaintiff, and the lack of consideration for the guarantee.

In these circumstances, I had allowed the appeal with costs. As for the defendants' other appeal against the learned Senior Assistant Registrar's decision disallowing a stay which was heard at the same time, I had held that no order was necessary in view of my allowing their appeal against the summary judgment.

YUSOF BIN AHMAD

v.

SYARIKAT KUANTAN LUMBER SDN. BHD.

HIGH COURT, KUANTAN
DATO' HJ. LAMIN BIN HJ. MOHD. YUNUS J.
[CIVIL SUIT NO. 191 OF 1976]
5 AUGUST 1992

TORT: Claim for personal injuries - Accident at work place - Claim of negligence against employer, the defendant - Claim of contributory negligence - Quantum of damages.

The plaintiff's foot was crushed by a piece of machinery known as a log carriage being operated by one of the defendant's employees. The plaintiff claimed that he instructed the machine operator to stop the machine by raising his hand in order to enable him to retrieve a hook which had fallen under the machine. However the machine operator failed to stop the machine and the log carriage reversed over and crushed his foot while he was standing on the roller support.

The machine operator (DW2) admitted that he was in complete charge of the machine and that the whole operation took place in his full view. He further admitted that it was his duty to see to the safety of the plaintiff and that he was charged with the responsibility of supervising the plaintiff's work.

Held:

[1] Before DW2 decided to reverse the log carriage it must be his duty to see that there was nothing placed in imminent danger and that it was safe for DW2 to bring back the carriage to its original position behind him.

[2] DW2's failure to be on the look-out when he was responsible for the safety of the plaintiff amounts to negligence. As for the plaintiff, the fact that he did not make sure whether DW2 would stop the carriage amounted to contributory negligence.

[3] Liability in apportioned between the defendant and the plaintiff at 60% - 40%.

[Claim allowed with interest and costs.]